No. 731

IN THE

Supreme Court of the United States

October Term, 1945.

HENRY GREENBERG,

Petitioner,

vs.

I. & I. HOLDING CORPORATION and HARRY BARROW, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Henry Greenberg, a bankrupt, respectfully prays that a writ of certiorari issue to review the order of the Circuit Court of Appeals for the Second Circuit entered November 5, 1944, reversing an order of the United States District Court for the Eastern District of New York. A certified transcript of the record in the case, including the opinion in the Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Honorable Court.

Opinions Below.

The opinion of the court below filed November 5, 1945, is not yet reported and for convenience is printed in the certified Record (pp. 48-52). The District Court filed a memorandum opinion on the question involved and the same is printed in full in the Record (R. 115, 116).

Basis of Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347 A). The date of the opinion of the Circuit Court of Appeals for the Second Circuit sought to be reviewed was November 5, 1945. Application for stay of mandate pending application in this Court for writ of certiorari was made December 14, 1945, and order staying the mandate pending the application for writ of certiorari in this Court was entered December 19, 1945.

Questions Presented.

The fundamental question presented in this petition is whether a Referee in Bankruptcy, having before him a petition for an arrangement filed by the debtor under Section 321 of Chapter XI of the Chandler Act (11 U. S. C. A. Section 721) in the bankruptcy proceeding which has never been closed, has no discretion, but must dismiss this petition, when the bankrupt has previously been denied a discharge by the same Referee after a contest on the merits in the bankruptcy proceeding on the ground that he had committed acts barring a discharge under the Bankruptcy Act, and the Referee's original order has also been affirmed by the District Court prior to the time of the filing of the petition for arrangement.

The fundamental nature of the foregoing question when considered from a jurisdictional standpoint is clari-

fied by the circumstance that it raises this issue: Must the debtor relief court on its own motion summarily dismiss such petition without either requiring the creditors to offer proof at a hearing of their objections to said petition or permitting the Referee upon the basis of the proof offered therein to rule upon the validity of these objections?

As particularly applied to the statute under which the petition for arrangement was filed, the question is whether under (Section 321 of Chapter XI of the Chandler Act; 11 U. S. C. A., Section 721) denial of a discharge in a pending bankruptcy proceeding precludes the bankrupt from obtaining confirmation of a plan of arrangement thereafter presented in the same proceeding.

A corollary to this question is the query: Is the denial of a discharge to a bankrupt in the bankruptcy proceeding *res judicata* in the same proceeding except by way of review or appeal?

A collateral jurisdictional issue is presented in this case by the fact that the debtor at the time of filing the petition for arrangement resided in a federal judicial district other than that in which the original bankruptcy proceeding was pending; with the consequence, that whereas it may be conceded, for the sake of argument merely, that the original court might be compelled to take judicial notice of its own records, the court of the federal district in which the debtor now resides would have had to be apprised through competent and duly tested proof, and not from judicial notice, of the alleged lack of right in the debtor to the benefits of Chapter XI of the Chandler Act (11 U. S. C. A. Section 701 *et seq.*). The question presented by this situation is whether the debtor has not suffered undue discrimination within the meaning of the "due process clause" of the Fifth Amendment to the Constitution of the United States?

A related question is whether the Referee in the original proceeding must not be constrained to pass upon the merits of the creditors' objections. These would be duly offered at a hearing through direct and cross-examination in order to obviate grave constitutional doubts as to the validity of the interpretation placed by the opinion, herein sought to be reviewed, upon Section 321 *et seq.*, of the Chandler Act (11 U. S. C. A. Section 721 *et seq.*).

A further related question is whether this constraint should not be imposed upon the Referee in the original proceeding in order to eliminate efforts by bankrupts through change of residence to avail themselves more readily of the benefits of the debtor relief proceedings of the Chandler Act. By filing these petitions initiating such proceedings under Section 322 of the Chandler Act in other federal courts, more than judicial notice of previous proceedings is called for as proof of the debtor's disqualification for a discharge.

Summary Statement.

The essential facts, which are undisputed, are contained in the opinion of the Circuit Court of Appeals for the Second ~~District Court~~ CIRCUIT and the Circuit Court of Appeals HELD upon the objections of respondents, as creditors, that the Referee in Bankruptcy had no jurisdiction to consider the petition for arrangement filed by the bankrupt under Chapter XI, as he had theretofore been denied a discharge by the said Referee under the Bankruptcy Act and the order of the Referee denying the discharge had been affirmed by the District Court.

Upon an involuntary petition in bankruptcy, Henry Greenberg was adjudicated bankrupt on December 29, 1939 (R. 40). After a hearing on specifications in opposition to a discharge before the Referee, he sustained the objections and denied the discharge (R. 41). This denial was on the ground that the bankrupt had committed acts bar-

ring his discharge under the Bankruptcy Act, and the Referee's order was ultimately affirmed by the District Court in August 1942 (R. 34-39, 63, 80); (*In re Greenberg*, 46 F. Supp. 289).

The bankruptcy proceeding, however, was not, and never has been, closed (R. 19, 41). Accordingly, on June 30, 1944, the bankrupt filed in the bankruptcy proceeding a petition for arrangement of his debts offering to unsecured creditors who were not entitled to priority the payment of one per cent. in cash (R. 101-405). This petition showed that the debtor had not resided in the Eastern District of New York for any portion of the six months immediately preceding the date of the filing of the said petition and had in fact not resided therein for at least three years previously thereto (R. 64). Pursuant to Section 334 of the Chandler Act, 11 U. S. C. A. Section 734, the Referee gave notice of a meeting of creditors to consider the plan of arrangement (R. 94). Before the date so set, I. & I. Holding Corporation, one of the respondents herein, and a creditor of the bankrupt, filed with the Referee a petition asking dismissal of the bankrupt's petition for an arrangement on the ground that the aforesaid denial of a discharge in bankruptcy precluded him from obtaining such relief (R. 106-111), and asserting specifically that said denial was *res adjudicata* as to said petitioning creditor's claim (R. 108).

There was a hearing on the plan (R. 17, 102-105). Thereafter the Referee entered an order vacating all proceedings theretofor had in the bankruptcy proceeding and confirmed the debtor's plan of arrangement (R. 16-30). This order came before the District Court on petitions for review filed respectively by I. & I. Holding Corporation (R. 7-15) and Harry Barrow, Inc. (R. 52-67), the objecting creditors, and the respondents herein. The debtor conceded (R. 112-114) that the proceedings before the Referee had been irregular in failing to give to cred-

itors the statutory notices required by Section 337 (3) of the Chandler Act, 11 U. S. C. A. Section 737 (3). Thereupon, the District Court referred the proceedings back to the Referee to set a date for the hearing on confirmation of the plan of arrangement, to fix a time for the filing of specifications of objection to confirmation, and for "all other purposes including the right of objecting creditors to raise the issue of law as they may be advised that the denial of a discharge to a bankrupt in the bankruptcy proceedings is *res adjudicata*, except by way of review or appeal" (R. 115-116).

Appeal was taken from this order by the objecting creditors, respondents herein, to the Circuit Court of Appeals. Although the Circuit Court cited several opinions of its own, which recognized the rule that appellate courts usually will not consider appeals from interlocutory orders of reference which decide nothing as to the merits of a dispute, that Court, nevertheless, allowed the appeal and reversed the order with directions to dismiss the debtor's petition.

Reasons Relied on for Allowance of the Writ.

1. The question involved in this appeal is vital in the administration of the Bankruptcy Act. Hundreds, if not thousands, of neccessitous bankrupts are denied discharge annually because of some alleged violation of the discharge provisions of Section 14 of the Chandler Act, 11 U. S. C. A. Section 32. The expense of applying for the vacation of orders denying such discharge or of having them reversed by way of review or of appeal are frequently unduly burdensome, if not, absolutely prohibitive. Must a bankrupt exhaust these remedies before he may file a petition in accordance with the Chandler Act for arrangement under Chapter XI or a Wage Earners' Plan under Chapter XIII? The Circuit Court of Appeals for the Second Circuit has directly answered the first half of

this question in the affirmative and by inescapable implication has given an identical answer to the second half. This Court according to the diligent research of counsel has never ruled on the proposition involved in these questions and it is respectfully urged that a decision on the problem is of prime importance in a genuinely equalitarian bankruptcy administration. As accurate a tribunal as is the Circuit Court of Appeals for the Second Circuit, it is submitted, would not have emphasized at the very outset of its opinion the observation of counsel that the question involved herein is one of first impression if independent judicial scrutiny of the authorities had not led to the conviction that counsel's remark was true.

2. Section 321 of Chapter XI of the Chandler Act, 11 U. S. C. A. Section 721, is an important statute in the body of the Bankruptcy Act, as added on June 22, 1938, by C. 575 Section 1, 52 Stat. 907.

This section reads:

> "*Filing petition; pending bankruptcy proceeding.*
>
> "A debtor may file a petition under this chapter in a pending bankruptcy proceeding either before or after his adjudication."

There is no provision in this section forbidding a bankrupt who has been denied a discharge in bankruptcy from filing a petition for arrangement.

3. Section 621 of Chapter XIII of the Chandler Act, 11 U. S. C. A. Section 1021, applicable to "Wage Earners' Plans," is identical in phraseology with Section 321 of Chapter XI, 11 U. S. C. A. Section 721 and its interpretation is indubitably controlled by the opinion of the Circuit Court of Appeals herein sought to be reviewed.

4. The decision of the Circuit Court of Appeals for the Second Circuit in the instant case is such an unqualified departure from the policy underlying the radical amendments made to the Bankruptcy Statute by the Chandler Act of June 22, 1938, as to call for the exercise by this court of its power of supervision.

5. The decision of the Circuit Court of Appeals for the Second Circuit, is a violation, based upon past analogies interpreting the Bankruptcy Act of 1898 and its amendments, of the present policy of The Congress to afford through the Bankruptcy Statute an inexpensive medium for the rehabilitation of the debtor.

6. The decision of the Circuit Court of Appeals constitutes discrimination against this debtor within the meaning of the "due process" clause of the Fifth Amendment to the Constitution of the United States (*Detroit Bank* v. *United States,* 317 U. S. 329, 338). Under the opinion of *Bluthenthal* v. *Jones,* 208 U. S. 64, it would be the duty of the objecting creditors to plead or to bring to the attention of the court of the federal district in which this debtor resides, the conclusive adjudication of the alleged lack of right in the debtor to a discharge under Chapter XI of the Chandler Act. The duty to plead denotes that the correlative burden of adducing proof or of otherwise bringing to the attention of the Court the conclusive adjudication of the debtor's right to a discharge rests upon the creditors; and that, to participate in the proceedings, they must establish the continued provability of their own claims. The decision below imposes the duty upon the court of one federal district to dismiss the proceeding *in limine.* This duty, however, can not thus be imposed upon the court of the federal district in which this debtor resides, in the absence of pleading or proof offered at a hearing to establish the defense. Hence, in

one instance, the debtor has his day in court whereas in the other he does not. Section 321 should therefore be construed to avoid this grave constitutional issue (*United States* v. *Jin Fuey Moy*, 241 U. S. 394).

Prayer.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding said court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the order of the Circuit Court of Appeals for the Second Judicial Circuit reversing the order of the District Court be reversed and remanded and that petitioner be granted such other and further relief as may seem proper.

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FREDERIC A. JOHNSON,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

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BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The District Court filed a memorandum opinion on the question involved and the same is printed in full in the record (R. 115, 116).

The opinion of the Circuit Court of Appeals filed November 5, 1945, is not yet reported and for convenience is printed in the certified record.

Statement of the Case.

A statement of the matter involved has been fully presented in our petition and the Court is respectfully referred to pages 1 to 9 therein. In the interest of brevity, the statement is not repeated here.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In reversing the order of the District Court.

2. In holding that objection by a creditor to the filing of a petition for arrangement before a Referee in Bankruptcy, upon the ground that petitioner has previously been denied a discharge in the same bankruptcy proceeding upon objection of said creditor, is *res judicata*.

3. In holding that the Referee in the original proceeding upon his own motion, without a hearing wherein proof of the debtor's lack of right to a discharge upon creditor's objections might be shown, must summarily dismiss the debtor's petition for arrangement filed under Sec. 321 of the Chandler Act.

4. In holding that the filing of the petition under Sec. 321 of the Chandler Act, 11 U. S. C. A. Sec. 721, and confirmation thereunder, does not supersede all prior proceedings, including the question of the previous discharge of the bankrupt.

5. In holding that the rule applicable in cases arising in bankruptcies prior to the Chandler Act that a denial of a discharge in a prior bankruptcy or composition proceeding was *res judicata* in a subsequent proceeding in bankruptcy supplied binding analogies under the Chandler Act, wherein a pending proceeding alone was involved.

6. In holding that the mere similarity between incidences of certain sections of Chapter XI in cases arising under Secs. 321 and 322 furnished a criterion of congressional intention as to the construction of the former section.

7. In construing Sec. 321 so as to discriminate against the debtor within the meaning of the "due process" guaranty of the Amendment to the Constitution of the United States.

Summary of Argument.

POINT 1. The summary dismissal of a petition for an arrangement filed in a pending bankruptcy proceeding Sec. 321 of the Chandler Act (11 U. S. C. A. Sec. 721) upon the ground that petitioner had previously been denied a discharge in the bankruptcy proceeding has no support in the wording adopted or the policy contemplated by Congress in enacting the debtor relief proceedings through the radical revision in 1938 of the Bankruptcy Act of 1898.

POINT 2. A petition for arrangement might be filed by a debtor under Sec. 322 of the Chandler Act (11 U. S. C. A. Sec. 722) in a district where he was residing after he had changed his residence from the district wherein he had been denied a discharge in the original Bankruptcy proceeding, which had been closed. Such petition is not subject to summary dismissal. This difference constitutes discrimination against petitioner herein in violation of the "due process" guaranty of the Fifth Amendment to the Constitution of the United States.

POINT I.

No provision of Chapter XI of the Chandler Act sustains a power in the judiciary to dismiss summarily a petition for an arrangement filed thereunder upon the ground that the petitioner had been denied a discharge in a pending bankruptcy proceeding.

This supposed power has been read into the Act as the result of a judicial gloss stemming from an interpretation of Sec. 14 of the Bankruptcy Act of 1898 (11 U.

S. C. A. Sec. 32) prior to its amendment in 1903. *Freshman* v. *Atkins*, 269 U. S. 121, decided in 1925, is the principal authority relied upon in the opinion below. In that case, there had been two bankruptcy petitions filed by the same party in the District Court. The application in the first proceeding was never acted upon. The second petition as to creditors included in the first proceeding was dismissed. The court, upon its own initiative, took judicial notice of the former application. This dismissal was sustained in this Court upon the following ground (269 U. S. at 123).

> "The refusal to discharge was not on the merits but upon the procedural ground that the matter could not properly be considered or adjudged except upon the prior application."

In other words, as the Court stated previously therein (*ibid*), "the pendency of a prior application for discharge is available in abatement as in the nature of a prior suit pending, in accordance with the general rule that the law will not tolerate two suits at the same time for the same cause." Thus, the dismissal was strictly in accord with the virtually universal recognition of the rule that a plea in abatement lies to dismiss the second of two identical suits or actions.

The result of this analysis of *Freshman* v. *Atkins, supra*, demonstrates that the discussion of the effect of a prior denial of a discharge as a bar by Mr. Justice Sutherland, who delivered the opinion, was dicta or, at most a resort to an unessential *ratio decidendi* by way of analogy. The result of his uncalled for distinction of *Bluthenthal* v. *Jones*, 208 U. S. 64, in the course of this discussion will be considered under Point II herein. The crux of his opinion according to the view expressed in the instant case by the Circuit Court of Appeals for the Sec-

ond Circuit was the following passage from *In re Fiegenbaum,* 121 Fed. 69, 70, decided on February 25, 1903 by the Circuit Court of Appeals for the Second Circuit. .

> "Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, *in limine,* so flagrant an attempt to circumvent its decrees" (quoted 269 U. S. *supra,* at 124; see also herein, R., p. 50).

In re Fiegenbaum, supra, involved, however, a transparent attempt to effect a brazen evasion, if not a fraud, upon court and creditors. Circuit Judge Coxe in the opening sentence of the opinion set forth tersely the facts and the issue raised by this attempt (121 Fed. at 70):

> "The simple question presented by this review is whether a bankrupt, who has been refused a discharge, after full hearing, on the ground that he has fraudulently concealed assets from the trustee, will be permitted, within a few months thereafter, to file a second petition alleging the same facts and prosecute a new application for a discharge."

The Record on Appeal therein shows that the first petition was filed on or about April 28, 1899 (ff. 6, 57). The second petition was filed on or about November 9, 1901 (f. 4). The order to continue under the second petition was entered as of January 23, 1902 (ff. 85-90). Hence, the entire proceedings were governed throughout by Sec. 14 of the Bankruptcy Act of 1898, 11 U. S. C. A. Sec. 32, prior to its amendment by Congress on February 5, 1903. As the text of this original act shows, a discharge was denied where the bankrupt had "(1) com-

mitted an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained" (Sec. 14 (b) [1] [2], 11 U. S. C. A. Sec. 32 (b) [1] [2]; cf. *Bluthenthal* v. *Jones*, 208 U. S., *supra*, at 65).

In the *Fiegenbaum* case, the Referee had reported in the first proceeding that the bankrupt had been guilty of the fraudulent concealment of assets with intent to defeat the Bankruptcy Law (f. 68). This report had been made on or about March 26, 1901 (*ibid*). It was in the face of this report, that petitioner had filed his second petition in November of the same year.

If *In re Fiegenbaum, supra*, therefore, should not be confined to its particular facts, it ought at least not be expanded into a general principle for a mechanical application of the doctrine of *res judicata* to dispose summarily of petitions for arrangement filed under Sec. 321 of Chapter XI (11 U. S. C. A. Sec. 721). There is, besides, no escape from the same fate for petitions filed in like circumstances by wage earners under Section 621 of Chapter XIII (11 U. S. C. A. 1021), if the opinion sought herein to be reviewed is left undisturbed.

The expansion, by repeated amendments of the scope of what was originally Section 14 (b) [1] [2] (11 U. S. C. A. Sec. 32 (b) [1] [2]) has led to the denial of discharge for misrepresentation under the present form of Section 14 (c) [3], 11 U. S. C. A. Sec. 32 (c) [3], where no appreciable loss was suffered by the objecting creditor (*In re Weinstein*, 34 F. 2d 964—S. D. California—1929) or where proof of deliberate or intentional fraud on the part of the bankrupt was entirely lacking (*In re Fineberg*, 36 F. 2d 392—W. D. New York—1929).

Under such circumstances, if a petition for an arrangement or for a wage earners' plan is subject to sum-

mary dismissal as in the case at bar, these debtor relief provisions in many instances will become dead letters (note 1).

It should be noted that apart from the *Fiegenbaum* case, *supra*, Mr. Justice Sutherland cites no authority, nor does he otherwise state, in *Freshman* v. *Atkins*, 269 U. S., *supra*, at 123, 124 the rule that a court must take judicial notice of, and give effect to, its own records in another and interrelated proceedings (*supra*, at 124). This power generally speaking, would seem to be discretionary (*ibid*).

In the delicate area of state and federal jurisdiction, the earlier practice which made a federal proceeding, *in personam*, *res judicata* as against the initiation of a similar proceeding in a state court has been decidedly, if not altogether, curtailed (*Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118).

Analogous considerations of delicacy, accorded traditionally by an appellate tribunal to the trier of the facts, would point to the existence of a similar principle hostile to the summary dismissal of the petition in the instant case. These considerations of delicacy are buttressed by the far weightier factor of the new philosophy towards debtors' rehabilitation incorporated into the final chapters of the Chandler Act. This policy or philosophy is at variance with the aims of the framers of the Bankruptcy Act of 1898, which are still operative in large measure under Chapters I-VII, inclusive, of the Act of 1938. Consequently, the denial of a discharge under those Chapters should not be *res judicata* under Chapters XI and XIII.

Collier on Bankruptcy (14th Ed.) Vol. 8, 280, states:

> "In a broad sense, debtor relief proceedings as well as proceedings under Chapters I to VII of the

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Note 1—See the recent argument of Referee Carl D. Friebolin against the retention of Section 14(c) (3) in the Chandler Act (Journal of the National Association of Referees in Bankruptcy Vol. 20, pages 3-4). It is submitted that the replies thereto, especially that of Mr. Parker, strengthen his position.

> Act are bankruptcy proceedings; if they were not bankruptcy proceedings, in the sense that the statutory provisions which authorize them did not constitute laws on the subject of bankruptcies, then those statutory provisions would not come within the constitutional grant of power to establish uniform laws on the subject of bankruptcies, and they would therefore be unconstitutional. But the Act itself does not use the words 'bankruptcy proceeding' in that broad sense, but uses them to distinguish the ordinary bankruptcy proceeding under Chapters I to VII from the debtor relief proceedings under other chapters of the Act."

There was palpably a new proceeding instituted by the filing of the petition for arrangement herein. The circumstance that for convenience in administration the incidences of the original proceeding remain operative (Secs. 325, 332, 352-354 of Chapter XI: 11 U. S. C. A. Secs. 725, 732, 752, 754) does not, contrary to the opinion of the Circuit Court of Appeals here in question (R., p. 51), override the major purpose of the Congress to afford every opportunity for an embarrassed debtor to obtain rehabilitation under federal law. Unless the debtor is given a hearing as to the validity of the creditors' objections based upon the effect of the previous denial to him of a discharge in bankruptcy he has not been given this opportunity.

POINT II.

The change of residence of the debtor to a federal district other than that in which he was residing, when he filed his petition in bankruptcy and was denied a discharge, entitles him to a hearing before the Referee upon the present petition for arrangement as to the effect of the denial of said discharge. A denial of this right constitutes discrimination within the interpretation of the "due process" clause of the Fifth Amendment to the Constitution of the United States.

If the pending bankruptcy proceeding had been closed, petitioner would have had the unquestioned right to file a petition for arrangement under Section 322 (11 U. S. C. A. Sec. 722), in the district of his residence. This section reads:

> *Same; original petition*
>
> "If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication."

The conclusion would seem irrefutable that this would be a new proceeding under Chapter XI. The duty of the objecting creditors to prove that the previous denial of a discharge was a bar to the petition for arrangement is thoroughly established.

In *Bluthenthal* v. *Jones,* 208 U. S. 64, the bankrupt was denied a discharge in the Southern District of Georgia. Subsequently, he filed a bankruptcy petition in the Southern District of Florida. Judgment-creditors, who objected successfully in the first proceeding, though notified of the second proceedings, did not prove their claim nor partici-

pate therein. When they subsequently sought to enforce their judgment, it was held that it was barred by the discharge in the second proceeding. Mr. Justice Moody, in delivering the opinion of this Court, declared (65, 66):

> "Though Bluthenthal & Bickart were notified of the proceedings on the second petition in bankruptcy and their debt was scheduled, they did not prove their claim or participate in any way in those proceedings. They now claim that their debt was not affected by the discharge on account of the adjudication in the previous proceedings.
>
> • • • There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the District Court for the Southern District of Florida, the judge of that court was, by the terms of the statute, bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified in sec. 14 of the bankruptcy act as amended. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his dis-

charge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal & Bickart intentionally remained away from the court and allowed the discharge to be granted without objection."

If the debtor herein had filed his petition for arrangement in the district court of his present residence, there would be no compulsion upon that court summarily to dismiss his petition upon the basis of judicial notice taken by the court of its own records. Thus, in what is submitted to have been the unnecessary treatment of the prior effect of discharge in bankruptcy by Mr. Justice Sutherland in *Freshman* v. *Atkins*, 269 U. S. *supra*, at 124, he has merely this to say of the above quoted opinion of Mr. Justice Moody:

> "There is nothing in *Bluthenthal* v. *Jones*, 208 U. S. 64, to the contrary. There the previous denial of a discharge had been in another court sitting in another state. This court held that, while an adjudication in bankruptcy, refusing a discharge, came within the rule of *res judicata*, the court in which the second proceeding was brought was not bound to search the records of *other* courts and give effect to their judgments." (Italics are those of Mr. Justice Sutherland.)

According to *Freshman* v. *Atkins*, *supra*, therefore, there is apparently no pronouncement of this Court to

eliminate the existence of the necessity, which is indicated by the opinion in *Bluthenthal* v. *Jones*, 208 U. S., *supra*, at 65, for the objecting creditors to establish the provability of their claims. A condition precedent, for pleading or otherwise bringing to the attention of the court in another district proof as to the effect of the prior denial to a petitioner of his application for a discharge, must be satisfied under such circumstances by the objecting creditors.

An interval of more than two years occurred between the affirmance of the order of the Referee denying a discharge in the pending bankruptcy proceeding and the filing of the petition for arrangement. There is no fact stated in the opinion of the Circuit Court of Appeals herein nor does the Record reveal that the statute of limitations during this period did not bar the claims of the objecting creditors. Within that lapse of time, at least, the debtor has never been immune from the commencement of actions against him.

From this more or less fortuitous circumstance that the pending bankruptcy proceeding was never closed, the debtor has been denied a hearing on the validity of the creditors' objections to his discharge, although they do not in any way impugn his good faith in changing his residence to another district. It is submitted that the result of such a construction of Section 321 of the Chandler Act will tempt undischarged bankrupts in the future to aid the closing of pending proceedings promptly and then move to another district wherein there is no recognition of the mandatory power of the federal judiciary summarily to dismiss a petition for arrangement. It is further submitted that the consequence of such a variance in the application of Section 321 constitutes discrimination against the debtor herein within the guaranty of "due process" of the Fifth Amendment (cf. *Detroit Bank* v. *United States*, 317 U. S. 329, 338 and authorities there cited).

Such a grave constitutional doubt should be obviated by an interpretation of Section 321 in the liberal spirit of the framers of the Chandler Act (*United States* v. *Jin Fuey Moy*, 241 U. S. 394). This would require a hearing at which the objecting creditors would have to establish the provability of their claims whether by reason of the running of the statute of limitations or any other intervening defense in order to oppose a rehabilitation proceeding upon the ground that the petitioner for arrangement had previously been denied a discharge in bankruptcy.

CONCLUSION.

For the reasons heretofore assigned, it is respectfully submitted that the case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

EDWIN M. SLOTE,
Attorney for Petitioner.

FREDERIC A. JOHNSON,
Of Counsel.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE COURT PRESS, N. Y. C.

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—against—

I. & I. HOLDING CORPORATION and HARRY BARROW, INC.,

Objecting Creditors-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Question Presented.

Respondents respectfully submit that the only question herein is whether the Bankruptcy Court should entertain the Debtor's second application for a discharge from his debts, by his filing a petition for an arrangement under Chapter XI, while there remains in full force and effect a prior order made by the same Court in a prior bankruptcy proceeding under Chapters I to VII denying the Debtor's discharge from the same debts listed in the arrangement proceeding.

Statement of Facts.

Over six years ago, on December 13, 1939, an involuntary petition of *bankruptcy* was filed in the Bankruptcy Court in the Eastern District of New York against the Debtor herein and he was duly adjudicated a bankrupt by that Court (p. 14).

Thereafter, objections to the bankrupt's discharge were sustained, and his discharge was denied on the ground that he was guilty of the acts and failed to perform the duties which bar his discharge under the Bankruptcy Act, to wit, fraudulent transfers, false financial statement, false oath, failure to keep books and failure to satisfactorily explain the loss of his assets (p. 3). The order denying the bankrupt's discharge was made by Referee Howard A. Fluckinger, and was confirmed (p. 12) by the order of the District Court, Galston, *J.*, dated July 27, 1942 (reported at 46 F. Supp. 289).

Two years went by, and the time of the bankrupt to appeal from the order denying his discharge had expired, and no motion was made by him to vacate or set aside the order denying his discharge.

Then on June 30, 1944 the bankrupt filed a petition, as a Debtor, for an arrangement under Chapter XI, in which he listed the same creditors who were listed in his prior bankruptcy proceeding. In other words, the Debtor listed exactly the same debts with reference to which his discharge was denied two years before.

In the Debtor's petition for an arrangement he asked the Court (a) to compel those same creditors to accept a 1% settlement in full for their claims, (b) to vacate the order entered two years prior denying his discharge, and (c) to grant his discharge from those same debts.

After the Debtor filed his petition for an arrangement, Referee Fluckinger, the same Referee as in the prior bankruptcy proceeding, gave notice (p. 34) that a meeting of creditors would be held on August 23, 1944 to consider the plan of arrangement giving the creditors 1% in full discharge of their claims (p. 11). At that meeting, the respondent I. & I. Holding Corporation, by verified petition (pp. 36 *et seq.*) called to the Referee's attention his order which he had signed on April 17, 1942 denying the Debtor's discharge from the same debts, and the order (p. 12) of the District Court, Galston, *J.*, which confirmed the Referee's order denying the Debtor's discharge. Respondent asked the Referee to dismiss the Debtor's petition for an arrangement discharging his debts on the ground that there was on file an order of the same Referee which was still in full force and effect denying the Debtor's discharge as to the same debts, and that, furthermore, the Debtor could not be discharged in the arrangement proceeding in view of Sections 366 (Subdivision 4) and 376 of the Bankruptcy Act, as he had been already found guilty of acts which barred his discharge.

The issue herein was a question of law. There was no question of fact. All the facts are matters of record and admitted by the Debtor.

Referee Fluckinger overruled the objections and made an order dated December 20, 1944 granting the Debtor's discharge from those same debts, and vacating his own prior order dated April 17, 1942 which denied the Debtor's discharge from those debts, and which had been confirmed by Judge Galston's order dated July 27, 1942.

The respondents herein then moved the District Court, Galston, *J.*, to review the Referee's order

dated December 20, 1944 granting the Debtor's discharge and confirming the arrangement plan; and the respondents asked the District Court (a) to vacate that order, and (b) to dismiss the Debtor's petition for an arrangement (pp. 25 and 26).

The District Court, Galston, *J.*, granted respondents' motion so far as to vacate Referee Fluckinger's order dated December 20, 1944, but the District Court referred back the matter to the Referee to go forward with the whole arrangement proceedings (p. 41, fol. 121).

It is respectfully submitted that it would be unfair and unnecessary to require the creditors to proceed with the expense and labor of the hearings of the arrangement proceeding and a second trial, between the same parties, of the same objections to the Debtor's discharge which had already been tried and decided against the Debtor. There was no question of fact to be determined, and Referee Fluckinger had passed upon the only question of law involved in the case. The District Court should have dismissed the Debtor's petition for an arrangement.

The respondents then appealed from the District Court to the Circuit Court of Appeals, Second Circuit. The Circuit Court of Appeals granted respondents' prayer, and reversed the District Court and directed that the Debtor's petition for an arrangement be dismissed in view of the fact that there remained in full force and effect a filed order denying the Debtor's discharge from the same debts in the prior bankruptcy proceeding.

This bankruptcy case, of an individual debtor, is now in its seventh year. The Debtor has been very assiduous in keeping his creditors engaged in the Bankruptcy Courts, and now the creditors need the

aid of the Court to prevent the Debtor from imposing upon and abusing the processes of the Bankruptcy Court, and to protect the creditors from the Debtor's attempt to retry the issue of discharge already decided against him.

POINT I.

The Circuit Court of Appeals had jurisdiction of the appeal.

In the case of *Securities & Exchange Commission* v. *U. S. Realty Improvement Co.* (1940), 310 U. S. 434, 84 L. Ed. 1293, it was held that an aggrieved party was entitled to appeal from an order of the Bankruptcy Court refusing to dismiss an arrangement proceeding under Chapter XI. The Court also held that it was the duty of the Bankruptcy Court to dismiss a proceeding whenever it appeared that a fair and equitable plan was not feasible, and that the aggrieved party had the right to appeal and challenge the exercise or non-exercise by the District Court of its jurisdiction. In the instant case it would be absolutely futile for the Referee to go through all the formalities of a proceeding under Chapter XI. The Referee cannot ignore his prior order denying the bankrupt's discharge, and regardless of the formality with which he conducts the proceeding under Chapter XI the result must be that the proceeding be dismissed.

See also *Dudley* v. *Mealey* (1945) (C. C. A. 2), 147 F. 2d 268.

POINT II.

The denial of the bankrupt's discharge from the same bankruptcy proceeding is *res judicata*.

In re Freshman v. *Atkins* (1925), 269 U. S. 121, at page 124, the Court said:

> "Denial of the discharge from the debts provable, of failure to apply for it within the statutory time, bars an application under a second proceeding for a discharge from the same debts."

There are numerous cases in various jurisdictions directly in point:

In re Colewell v. *Epstein* (1944) (C. C. A. 1), 142 F. 2d 138;

Duggins v. *Heffron* (1942) (C. C. A. 9), 128 F. 2d 546, affirming 46 Am. B. R. (N S) 671;

In re Chopnick v. *Tokatyan* (1942) (C. C. A. 2), 128 F. 2d 521;

In re Perlman v. *322 West Seventy Second Street Co.* (1942) (C. C. A. 2), 127 F. 2d 716;

In re Perlman (1940) (C. C. A. 2), 116 F. 2d 49;

In re Summer (1939) (C. C. A. 2), 107 Fed. 2nd 396, cert. denied 309 U. S. 680;

In re Hill v. *Railroad Industrial Finance Company* (1937) (C. C. A. 10), 92 Fed. 2d 973;

Sawyer v. *Orlov* (1926) (C. C. A. 1), 15 F. 2d 952, cert. den. 274 U. S. 736;

In re Kuffler (1907) (C. C. A. 2), 151 Fed. 12; see also *In re Kuffler* (1907) (E. D. N. Y.), 155 F. 1018;

In re Semons (1906) (C. C. A. 2d), 140 Fed. 989;
In re Zeiler (1937) (S. D. N. Y.), 18 F. Supp. 539;
In re Bishop (1936) (W. D. N. Y.), 13 F. Supp. 905;
In re Mayer (1933) (E. D. N. Y.), 4 F. Supp. 203;
In re McMorrow (1931) (W. D. N. Y.), 52 Fed. 2d 643;
In re Brislin (1931) (N. D. N. Y.), 10 Supp. 181;

In *Sawyer* v. *Orlov, supra,* the Court held that the denial of a composition, by reason of a transfer in fraud of creditors, was *res judicata* as to the bankrupt's right to a discharge in a subsequent bankruptcy proceedings, and denied a discharge to the bankrupt.

See also *In re Klein's Outlet, Inc.* (1942) (S. D. N. Y.), 50 F. Supp. 557.

POINT III.

The Court will take judicial notice of its own order denying the Debtor's discharge.

In the case of *Freshman* v. *Atkins* (1929), 269 U. S. 121, the Court said (p. 123) that where there has been a prior discharge proceeding already adjudged or still pending, the Court will on its own motion refer to its own records of the prior proceeding. At page 124, the Court reprimanded the bankrupt for his conduct in ignoring the first proceeding, and said:

> "To ignore it and make a second application, involving a new hearing, was an imposition upon

and an abuse of the process of the court, if not a clear effort to circumvent the statute by enlarging the statutory limitation of time within which an application for a discharge must be made. In such a situation the court may well act of its own motion to suppress an attempt to overreach the due and orderly administration of justice. What is said in the *Fiegenbaum* case, 57 C. C. A. 409, 121 Fed. 70, is appropriate here:

> 'Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, *in limine*, so flagrant an attempt to circumvent its decrees.' "

POINT IV.

The Referee's decision was erroneous.

The Referee herein in his decision said that the filing by the Debtor of his petition for arrangement in 1944 "has the legal effect of raising the discharge question *de novo*" (fol. 45). And the Referee without further hearing, vacated (p. 10) that discharge order and confirmed the arrangement, thereby directly violating Section 366(4) which provides that a discharge shall not be granted where the Debtor has been found guilty of acts barring his discharge.

Under the Referee's interpretation of the law, all guilty bankrupts could "vacate" the orders denying their discharge by merely filing a second bankruptcy petition for an arrangement; and, according to the Referee, those guilty bankrupts could effect that result regardless of how many years had elapsed since their discharge had been denied.

The Referee, in his decision herein, said that the Debtor's petition herein for an arrangement "is in the nature of an answer, or responsive pleading, to the original bankruptcy proceeding and has the effect of superseding in every way the original bankruptcy proceeding" (fol. 44). We believe that the Referee was in error.

In the first place, the time of the Debtor to *answer* in the original bankruptcy proceeding, expired years before on December 29, 1939, and the Debtor had defaulted and was consequently adjudicated a bankrupt on that date.

In the second place, Section 325 expressly provides that the filing of a petition for an arrangement shall not stay the prior bankruptcy proceeding; but that the Court may grant such a stay upon notice to all creditors. No such notice has been given herein and no order staying the prior bankruptcy proceeding has been entered.

The Referee in his decision overlooked the limitation which Congress expressly provided by enacting Section 366(4). A Debtor, although he filed a petition under Section 321, cannot possibly have his plan confirmed if he has been guilty of any act which bars his discharge as a bankrupt.

POINT V.

Whether the prior bankruptcy proceeding and the subsequent arrangement proceeding, are considered separate proceedings or one combined proceeding, the fact is that the Debtor's application for a discharge has been tried and decided against him.

A proceeding under Chapters I to VII of the Bankruptcy Act, and a proceeding under Chapter XI of the Bankruptcy Act, both operate as applications for a discharge. See Section 14a and Section 371. Therefore the Debtor herein must be deemed under the Bankruptcy Law to have made two applications for his discharge.

As a valid order was entered denying his first application for a discharge in the prior bankruptcy proceeding, then that order, while it remains in force and effect, is a bar to a second application by the Debtor for a discharge from the same debts, whether made in the same proceeding or in a subsequent proceeding.

As a matter of clear logic when the order was made denying his discharge in bankruptcy, there remained nothing on which a subsequent application for an arrangement could operate.

In the instant case, the Debtor listed in his petition for an arrangement the very same creditors as in the prior bankruptcy proceeding. There were no new or additional creditors. In fact, the Debtor filed his petition for an arrangement under Section 321, in the same pending bankruptcy proceeding in which his discharge was denied, and under the same file number (#38181). The Debtor's contention that he has a right to file a second application for a discharge

in an arrangement proceeding, just because his prior bankruptcy proceeding, in which his discharge was denied, is still pending, is frivolous. That would mean that a bankrupt whose discharge has been denied but whose bankruptcy proceeding was still pending would have the right to retry the issue of his discharge by filing a petition under Chapter XI, but that a similar bankrupt whose bankruptcy proceeding has been closed even one day would not have the right to retry the issue of his discharge.

POINT VI.

The Debtor did not obtain new rights by changing his residence.

The Debtor's contention, on page 9 of his brief, that his change of residence since his prior bankruptcy and the denial therein of his discharge, entitled him to a retrial thereof, by the same Court which denied his discharge, is clearly frivolous.

CONCLUSION.

The objecting creditors respectfully pray that the Debtor's petition for a writ of certiorari be denied.

Respectfully submitted,

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